circumstances can arise where the appeal has to be dealt with in a particular way irrespective of the views of the Court on the question of law on which its decision is really sought.

That position has arisen here.

It is now well settled that all these sanction cases have to be considered in the light of the case of *Gokulchand Dwarkadas Morarka v. The King.* (2) It is also settled that in this country what was said in *Morarka's* case has to some extent to be read in the light of the differences which exist between the Indian Code of Criminal Procedure and our own Code (see *Lyn Hong Yap v. Public Prosecutor* (3)). In the present case the Magistrate was of the opinion that thus viewed the sanction was bad. The Judge was of the opinion that thus viewed the sanction was good.

With great respect to everybody concerned we do not think the question arises. Or rather if it does arise it arises in a purely hypothetical and academic way for whether the sanction be good or bad it was a sanction to institute a prosecution for something which is not an offence and whether or not the learned Magistrate's view as to the validity of the sanction was correct it is clear that his decision to discharge the defendants was correct and we would not be justified in interfering with it.

We would add that the course we have taken is similar to that taken by the Divisional Court in the case of *Tindall v. Wright.* (4) That was an appeal by way of case stated which raised two distinct questions. Counsel for the appellant conceded that the first question was concluded against him by a previous decision of the Court but stated that both parties desired a decision on the second question. The Court declined to consider the question and Lord Hewart, C.J., observed (at p. 217) that if they were to enter upon the problem "however attractive it may be":—

"We should be offering a decision, at the request of the parties, which would be essentially in the nature of an *obiter dictum* and would not be binding upon any other court..... No doubt it does seem a little flaw on the first view of the matters in which the parties upon the one side and upon the other side desire that a particular problem should be solved — although the case from which it arises is disposed of in another way — that this court should refrain from entering on the inquiry and giving a decision. But.....the decision so given might easily lead not to enlightenment but to embarrassment for those who have to consider a similar problem afterwards."

Reference answered.

Solicitors: *S. Seenivasagam & Sons.*

LIEW KWEE SAM v. YAP SEOW LOONG & ORS.

[O.C.J. (Smith J.) November 27, 1958]

[Seremban — Civil Suit No. 55 of 1951]

Partnership — Licensed rubber dealers business — Whether all partners required to be licensed as rubber dealers.

Rubber Supervision Enactment, 1937 (F.M.S.) ss. 5(i) and 17(i) — Principal object of the Enactment.

Interpretation — Revenue law — Breach of.

This was a claim by the plaintiff against the alleged partners of a rubber dealers' business for the sum of $5,097.42 due on an account for rubber sold and delivered to the alleged firm.

The first and third defendants had submitted to judgment. The fourth defendant was out of the jurisdiction and unserved. The second defendant contested his liability.

The basic facts of the case were not in dispute. The first defendant before the war was a rubber dealer in Seremban carrying on business under the style of Tong Seng Rubber Co. He started up his business again at the end of 1945 still under the style of Tong Seng Rubber Co. and took out a rubber dealer's licence for himself alone trading as Tong Seng Rubber Co. On January 14, 1946 he took in eight other partners. These partners were, in accordance with the terms of the partnership agreement, sleeping partners. The sole management of the business was to be in the hands of the first defendant and the rubber dealer's licence was to be in his name and his alone. Accordingly when it became necessary to apply for renewal of the rubber dealer's licence the first defendant applied in his own name indicating that he was trading as the Tong Seng Rubber Co., but did not disclose the fact that he had eight sleeping partners. This state of affairs continued down to 1951. Throughout all this period the plaintiff had been selling his rubber to the Tong Seng Rubber Co. The plaintiff said that he was aware that the first defendant had a rubber dealer's licence but that he did not know and took no steps to ascertain whether any of his partners' names were included in the licence. He was aware that there were other partners, and had met the second defendant on the premises of the first defendant, and the second defendant had said that he was a partner. The plaintiff said he knew that the first defendant was licensed and considered that the first defendant represented all the partners. He also said, and it was not denied, that the second defendant did not tell him that he was retiring from the partnership.

From time to time various members of the partnership withdrew therefrom and on June 11, 1951 the second defendant also withdrew. He did not give notice of his withdrawal to the plaintiff. The last dealing of the plaintiff with the Tong Seng Rubber Co. was on June 13, 1951 when he delivered some rubber and scrap.

Under section 5 of the Rubber Supervision Enactment all persons purchasing rubber must be licensed, and section 17(i) of the same Enactment provides that when two or more persons are in partnership it is not neces-

sary for each of them to have a separate licence but that the names of each partner shall be included in the licence.

Held: (1) under the Enactment all persons in the partnership should have been named in the licence, the partnership was therefore not properly licensed. But it is clearly settled law that where the breach by the partner is of a revenue law persons trading with them are not to be considered as *particeps criminis* in the partners' unlawful trading;

(2) the object of the Enactment is in its broadest sense for the public good and any breach of the Enactment should be regarded in the same way as breach of a revenue enactment and for this reason the plaintiff is entitled to recover against all members of the partnership.

Cases referred to:—

(1) *Heydon's Case* (1584) 3 Co. 7d.

(2) *Brown v. Duncan,* 109 E.R. 385.

(3) *Osborne v. Williams,* 34 E.R. 360, 361.

(4) *In re South Wales Atlantic Steamship Company,* (1875-6) 2 Ch. D. 763.

CIVIL SUIT.

Balwant Singh for plaintiff.

C. H. Smith for 2nd defendant.

Cur. Adv. Vult.

Smith J. (having stated the facts in the terms set out in the head notes above continued): On these facts there can be no doubt that the second defendant would be liable, provided that the contract between the plaintiff and the partners was legal. In so far as the last delivery of rubber is concerned, the second defendant would still be liable because he had not given express notice of his retirement from the partnership to the plaintiff.

The plaintiff's case is either that the plaintiff contracted solely with the first defendant, or alternatively, if he considered himself to be contracting with the partnership, then that contract was illegal because the sleeping partners had not been duly licensed under the Rubber Supervision Enactment, 1937.

It is first necessary to decide whether all the partners in a rubber dealer's business are required by law to be licensed as rubber dealers. Section 5(i) of the F.M.S. Rubber Supervision Enactment, 1937, provides that ".....no person shall purchase.....rubber.....unless he shall have been duly licensed in that behalf under this Enactment." Section 17(i) reads as follows:—

"Two or more persons carrying on business in partnership shall not be obliged to obtain more than one licence appropriate to the circumstances in respect of which the licence is issued, and a licence to two or more persons shall not be determined by the death or retirement from business of any one or more of the partners."

The effect of section 5 is that all persons purchasing rubber must be licensed, and section 17(i) provides that where two or more persons are in partnership it is not necessary for each of them to have a separate licence but that the names of each partner shall be included in the licence. I cannot see that because certain partners in a partnership have handed over all powers of management to a single partner that they are any the less carrying on the business than when each and every one of them takes an active part. They are not carrying on the business personally but they are carrying on the business through their agent, the managing partner. It appears to me to be the very clear intention that each and everyone of the partners shall be licensed. Any interpretation whereby the name of any partner can be suppressed would appear to me to be defeating one of the objects of the Enactment, viz., that reputable persons only shall trade as rubber dealers. If it were not necessary to disclose all the partners to the licensing authority it would be possible for a person who had been refused a licence on the ground that he had repeatedly broken the provisions of the Enactment to continue to trade as a rubber dealer by becoming a sleeping partner. This I consider would make a mockery of the law and would not be an interpretation of this Enactment which would "suppress the mischief and advance the remedy" — see *Heydon's Case* (1) quoted in *Craies* on Statute Law, page 93, 4th edition.

I am satisfied, therefore, that all the persons should have been named in the licence and that the partnership was therefore not properly licensed under the Enactment.

It was argued that because the partners are not licensed the partnership has been carried on in breach of the provisions of the Enactment since what has been done is expressly prohibited by the Enactment and that the agreement between the partners is therefore invalid — see *Chitty* on Contracts, 20th edition, page 518. It is, however, clearly settled law that where the breach by the partners is of a revenue law persons trading with them are not to be considered as *particeps criminis* in the partners' unlawful trading. This was the judgment of Lord Tenterden, C.J. in *Brown v. Duncan.* (2) That was a case in which a firm of five distillers was seeking to recover from a surety the price of spirits sold and delivered. The defendant raised as his defence the fact that one of the partners was not included in the licence. Lord

Tenterden distinguished between breach of revenue enactments where there has been no fraud on the revenue and breaches of the provisions of Acts of Parliament which have for their object the protection of the public such as the Acts against stock-jobbing and the Acts against usury.

It becomes necessary to consider, therefore, what type of enactment the Rubber Supervision Enactment is. The long title reads as follows:—

"An Enactment to consolidate and amend the law relating to the supervision of dealings in rubber and of statistics concerning rubber cultivation and to provide for matters incidental thereto."

Section 32 provides for rules to be made on the following topics:—

(a) for further securing the effectual control of the sale, purchase, storage, disposal and the packing for export of rubber and the prevention of fraud in connection therewith;

(b) for regulating or controlling the methods of treatment of rubber;

(c) for prescribing fees to be charged under this Enactment.

From the foregoing it appears to me that the principal object of the Enactment is economic, viz., the control of the rubber-producing industry of this country in the best interests of the economy of the country as a whole. Its object is not to protect members of the public against unscrupulous dealers or rubber dealers against dishonest producers. The object of the Enactment is in its broadest sense for the public good. I consider that breach of the Enactment should be regarded in the same way as breach of a revenue enactment and for this reason I consider that the plaintiff is entitled to recover against all members of the partnership.

If I am wrong in this view and the law, properly construed, is one generally established for the protection of the public, then I consider that the words of Lord Thurlow referred to in *Osborne v. Williams,* [3] at page 361 are in point. Lord Thurlow was dealing with the case of money paid for an illegal purpose and he appears to have thought "that in all cases, where money was paid for an illegal purpose, it might be recovered back; observing, that 'if Courts of Justice mean to prevent the perpetration of crimes, it must be, not by allowing a man, who has got possession, to remain in possession, but by putting the parties back to the state, in which they were before'." These remarks I consider refer very much to the facts of this particular case. It may well be that the plaintiff has committed an offence under the Rubber Supervision Enactment by abetting an offence by all the partners who have carried on business without being properly licensed. Even so, it appears to me to be wrong for the defendants, having got possession of the plaintiff's rubber, now to set up their own illegal act as a reason for not returning or paying for that rubber. Since the rubber cannot now be returned the only way in which the plaintiff can be put back in the position in which he was before is by the defendants paying to him the value of the rubber.

I am fortified in this view by some remarks *obiter* by Mellish, L.J. in *In re South Wales Atlantic Steamship Co.* [4] This case concerned an attempt by a firm of solicitors who had acted for an unregistered company to obtain an order to wind up that company. It was held that the solicitors could not obtain an order to wind up the company since, as the company was illegal no legal debt arose in respect of that part of their demand. Malins, V.C. in the course of his judgment had said:—

"All men are bound to know the law. Any man in any way connected with business, and who has business transactions with the world, must know, and does know, and must have attributed to him the knowledge of this Act of Parliament, which has become one of the most notorious, from various circumstances, that has ever been put on the statute book."

Dealing *obiter* with this in his appeal judgment Mellish, L.J. said at page 781:—

"I should be very unwilling to hold, unless I find myself absolutely compelled to do so, that a purely innocent person who employs a partnership of this kind can be prevented from maintaining an action against all the members of it who are practically interested in it, because, without his knowing it, they happen to be more than twenty. Suppose a common ordinary partnership were carrying on this business, it seems to me a very extraordinary thing that a creditor should have any obligation put upon him to inquire whether the partners were more than twenty or not. If an action could be maintained, I should have great difficulty in saying that there could not be a winding-up order on the application of a creditor."

Applying those remarks to the present case I think it is asking a little too much that every person who sells his rubber in a rubber dealer's shop must inspect the dealer's licence and then if he finds that the dealer trades under a name other than his own be obliged to make an enquiry at the Business Names Registry in order to discover whether or not he has any partners. I consider that provided the rubber producer satisfies himself that the person with whom he is dealing is licensed, he may sue any partner whether licensed or not. I do not see that he should be precluded from recovering the value of his rubber. As Sir William Grant, M.R. said in *Osborne v. Williams, supra,* "Courts both of

Law and Equity have held that two parties may concur in an illegal act without being deemed to be in all respects in *pari delicto*." I cannot see that in the present case the offence by the plaintiff is as great as the offence by the partners, if any offence there be by the plaintiff. This is not a case of trading with a completely unlicensed rubber dealer but the case of a person dealing with a licensed dealer in partnership with unlicensed partners. There will therefore be judgment for the plaintiff against the second defendant as prayed with costs.

Claim allowed.

Solicitors: *Balwant Singh; Donaldson & Burkinshaw.*

PONNUSAMY & ANOR. v. NATHU RAM

[C.A. (Thomson C.J., Rigby and Hepworth JJ.) August 26, 1958]

[Ipoh — F.M. Civil Appeal No. 7 of 1958]

Sale of land — Transfer executed but not registered — Purchaser in possession — Death of purchaser — Action by executors of purchaser for declaration of title and rectification of register — Whether action for recovery of land — Limitation — Period of — Land Code (F.M.S. Cap. 138) — Limitation Enactment (F.M.S. Cap. 18) Article 97 — Limitation Ordinance, 1953, ss. 6 and 9.

In August, 1944, respondent sold his land to Naina (of whose will appellants are the executors) and executed a transfer in statutory form. Naina entered into possession but did not register the transfer. He died on February 11, 1949 and thereupon the transfer became unregistrable. The appellants brought an action on December 1, 1956 claiming declaration of title to the land and an order on the registering authority to register appellants as proprietors. The respondent pleaded limitation as one of his grounds of defence which point of law was disposed of by the trial Judge under R.S.C. 1957 O. 25. The trial Judge having considered the pleadings held (i) that the action was for a declaration of title and was governed by article 97 of the Limitation Enactment (Cap. 18), (ii) having regard to the defence, the respondent had taken steps to challenge Naina's rights, (iii) the date of Naina's death, i.e. February 11, 1949, was the crucial date when the right to sue accrued, but, by reason of the Moratorium, limitation ran from October 1, 1949 when it was lifted, (iv) the action having been commenced more than 6 years after that date, it was barred by limitation. The appellants appealed.

Held by the Court of Appeal: (1) the issue of limitation having been disposed of under R.S.C., O.25, it fell to be dealt with on the assumption that the facts were as stated in the plaint;

(2) the action was one to recover land within the meaning of section 9 of the Limitation Ordinance;

(3) the period of limitation for such an action is 12 years and the present action was not barred.

Cases cited:—

(1) *Noyes v. Crawley,* 10 Ch.D. 31.

(2) *Lala Soni Ram v. Kanhaya Lal.* L.R. 40 I.A. 74.

(3) *Bolo v. Koklan,* L.R. 57 I.A. 325.

(4) *Bachan Singh v. Mahinder Kaur & ors.* (1956) M.L.J. 97.

(5) *Loke Yew v. Port Swettenham Rubber Co.,* (1913) A.C. 491.

(6) *Suppiah Chettiar v. Ong Pee Koi & anor.,* (1951) M.L.J. 49.

(7) *Bridges v. Mees,* (1957) 2 All E.R. 577.

(8) *Mills v. Haywood,* 6 Ch.D. 196.

(9) *Abdul Rahman Khan v. Lala Parsotani Das,* (1930) 128 I.C.

(10) *Butcher v. Reeves,* (1891) 2 Q.B. 509.

(11) *Board of Trade v. Cayser, Irvine & Co., Ltd.,* (1927) A.C. 610.

(12) *Pir Baksh v. Mohamed Tahir,* L.R. 61 I.A. 388; A.I.R. 1934 P.C. 236.

(13) *Haji Osman v. Saiyed Noor* (1952) M.L.J. 37.

(14) *Venkatachalam Chettiar & ors. v. Arunasalam Chettiar* (1953) M.L.J. 19, (1954) M.L.J. 234.

(15) *Williams v. Thomas* (1909) 1 Ch. 713.

COURT OF APPEAL — appeal against the decision of Syed Sheh Barakbah J.

B. K. Das (*P. P. Dharmananda* with him) for the appellants: Plea of limitation taken as a preliminary point of law, by way of demurrer — Court must accept facts as stated in plaint as correct in deciding this point of law. *Noyes v. Crawley.* (1)

Article 97 of the Limitation Enactment, (Cap. 18) does not apply. Before period under article 97 expired, new Limitation Ordinance No. 4 of 1953 came into force. Court must apply statute in force at date of institution of action. *Lala Soni Ram v. Kanhaya Lal.* (2) Section 34(a) Limitation Ordinance has retrospective effect.

N. Sharma for the respondent — concede new Ordinance applies, but say period is 6 years under section 6(6), not 12 years.

Das (continuing):

Right to sue under article 97 accrues when there is infringement of or clear and unequivocal threat to infringe right by defendant. *Bolo v. Koklan.* (3) Here, none, until defence filed.

This is an action for rectification of register. Section 240 Land Code, *Bachan Singh v. Mahinder Kaur & ors.*; (4) *Loke Yew v. Port Swettenham Rubber Co.* (5) If limitation applies, then 12 years under section 9, Limitation Ordinance.

Submit, respondent bare trustee for testator and appellants; purchase price paid, possession given. See definition of "trust" and "trustee" in the Limitation